

Townley Sweeping Service, Inc. Case 22-AO-00001

June 16, 2003

**ORDER DENYING PETITION FOR
ADVISORY OPINION**

BY MEMBERS LIEBMAN, SCHAUUMBER, AND WALSH

Petitioners, Abdul Saquar and Tony “Jamal” McRiney, have filed a Petition for Advisory Opinion as to jurisdiction in the above proceeding. For the reasons set forth below, we deny the petition.

Background

The Petitioners are plaintiffs in a wrongful termination and defamation action against Townley Sweeping Service, Inc., a New Jersey corporation (the Employer) and Kenneth Battiato (collectively the Defendants) in the Superior Court of New Jersey. The complaint alleges that the Employer wrongfully terminated the Petitioners in January 2001, in retaliation for attempting to unionize the workplace and for communicating with a union organizer, and that Petitioner Saquar was wrongfully accused of stealing trash bags as a pretext for his termination. In response to the complaint, the Defendants filed an answer and Motion for Summary Judgment contending, inter alia, that the Petitioners’ State court action was preempted by the National Labor Relations Act under the principles set forth in *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959).

On September 18, 2002, the Superior Court issued an order dismissing the complaint in its entirety without prejudice. The order further provided that the Petitioners would have 45 days to file a request for an advisory opinion with the National Labor Relations Board (NLRB) concerning the Board’s jurisdiction over the subject matter of the complaint, and that the Petitioners would have 30 days from the Board’s final action on any such request to file an action with the court for any matters not disposed of by the Board’s opinion.

Pursuant to the court’s order, on November 1, 2002, the Petitioners filed the instant petition for an advisory opinion. The petition does not dispute the commerce data provided by the Defendants in support of their Motion for Summary Judgment in the state court proceeding.¹ However, the petition states that the Petitioners

¹ The petition references and attaches the Defendants’ Certification in Support of Motion for Summary Judgment, filed by Kenneth W. Battiato, the Employer’s President. The Certification states that the Employer is in the business of providing cleaning and maintenance services to supermarkets, shopping centers, and similar establishments throughout New Jersey, New York, Pennsylvania, and Connecticut; that, as of January 1, 2001, the Employer had annual revenues in excess of \$1 million; and that during the 12-month period preceding the filing of the complaint and date the Petitioners were terminated, the Employer

opposed the Motion for Summary Judgment in that proceeding on the grounds that New Jersey wrongful discharge and common law defamation claims are not preempted by Federal labor law.

On November 27, 2002, the Employer filed a response requesting that the Board issue an opinion that jurisdiction would lie with the NLRB based on the facts. The Employer asserts that the opinion would be instructive to the State court in determining, conclusively, that it does not have jurisdiction to entertain the complaint.

Ruling on Petition

Having duly considered the matter,² we deny the petition for an advisory opinion. Sections 102.98 and 102.99 of the Board’s Rules and Regulations permit a state or territorial agency or court, but not parties to state proceedings, to file a petition for an advisory opinion with the Board on the limited question whether the Board would decline to assert jurisdiction based either on its commerce standards or because the employer is not within the jurisdiction of the Act. Those sections do not provide for advisory opinions on: one, whether particular conduct is protected or prohibited by the Act; or two, whether a State court lacks jurisdiction over a dispute under the principles of *Garmon* preemption.³

Under the aforementioned Rules, the individual petitioners cannot petition on their own behalf for an advisory opinion. To the extent the individual petitioners here are acting at the behest of the Superior Court of New Jersey, we need not reach the issue as to whether such a petition is cognizable under our Rules as the petition must be denied in any event. The jurisdictional commerce facts set forth in the petition raise an issue repeatedly addressed in numerous prior Board opinions and decisions, so no advisory opinion is necessary.⁴ To the extent the Superior Court, through the parties, seeks

purchased goods and materials valued in excess of \$50,000 directly and/or indirectly from suppliers located outside of the State of New Jersey.

² The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

³ See also Sec. 101.40 of the Board’s Statements of Procedure (The Board will limit its advisory opinion to the jurisdictional issue confronting it, and will not presume to render an opinion on the merits of the case or on the question of whether the subject matter of the dispute is governed by the Labor Management Relations Act).

⁴ The Board’s standard for asserting jurisdiction over nonretail enterprises is an annual outflow or inflow, direct or indirect, across state lines of at least \$50,000. *Siemons Mailing Service*, 122 NLRB 81 (1959). See also *Versatech Industries, Inc.*, 333 NLRB No. 107 (2001) (not reported in Board volumes); *Sir Thomas Industrial Bldg. Maintenance Co.*, 323 NLRB 679 (1997). We note that there are various other avenues or procedures for obtaining a jurisdictional determination or opinion from the Board’s regional offices. See Sec. 101.41 of the Board’s Statements of Procedure, and Sec. 11702 of the NLRB Case-handling Manual (Part One) (Revised November 2002).

an opinion on whether their dispute is cognizable under the Act, and/or whether the court lacks jurisdiction over the dispute under the principles of *Garmon* preemption,

we adhere to the position that such issues are not properly addressed by the Board in an advisory opinion.

Accordingly, the Petition for Advisory Opinion as to jurisdiction is denied.